

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
FEBRUARY SESSION, 1996

FILED

July 23, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

DWAYNE ROGERS,)
)
Appellant)
)
vs.)
)
STATE OF TENNESSEE,)
)
Appellee)

No. 03C01-9503-CR-00087

HAMILTON COUNTY

Hon. Stephen M. Bevil, Judge

(Post-Conviction)

For the Appellant:

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OPINION FILED: _____

REVERSED AND REMANDED

David G. Hayes
Judge

OPINION

The appellant, Dwayne Rogers, appeals as of right from the order of the Criminal Court of Hamilton County dismissing his *pro se* petition for post-conviction relief. The appellant contends that the trial court should have granted an evidentiary hearing as to whether he received effective assistance of counsel at the trial court level. The State concedes that this cause should be remanded in order for the appellant to submit an amended petition with the assistance of appointed counsel. We agree.

Background

On July 28, 1992, the appellant pled guilty to aggravated robbery, a class B felony, and to theft of property, a class E felony. Pursuant to the plea agreement, the appellant was sentenced, as a range II offender, to twelve years for aggravated robbery and to four years for theft of property.

On November 15, 1994, the appellant filed a *pro se* petition for post-conviction relief. The petition alleges that:

Petitioner has suffered violations of rights in that he was denied effective representation of counsel, suffered from and as a result of misconduct by the prosecution, and was denied due process and was prejudiced by an abuse of discretion on behalf of the trial court.

Due to the violations of petitioner's rights the plea bargain was not voluntary, intelligent, nor knowingly entered in the court. Had petitioner been aware of the unusual circumstances surrounding the plea bargain, he would have withdrawn his guilty plea and insisted on going to trial.

The appellant proceeded without the assistance of counsel.

On February 15, 1995, the trial court denied the appellant's petition without granting him an evidentiary hearing and without appointing counsel. The order denying the petition recites: "[t]he petitioner makes no specific allegations, nor does he allege any details of an abridgement of any constitutional right. The petition. . . merely states conclusions without alleging some facts to support his conclusions. The Court finds that the petitioner has failed to state a colorable claim for relief"

Analysis

The court may properly dismiss a petition where the petition has been competently drafted and all pleadings, files and records conclusively show that the petitioner is not entitled to relief.¹ Tenn. Code Ann. § 40-30-109 (a)(1) (1990). However, a petition shall not be dismissed for technical defects, incompleteness or lack of clarity until after the petitioner has had reasonable opportunity , with the aid of counsel, to file amendments.² Tenn. Code Ann. § 40-30-107 (1990). Although the appellant's *pro se* petition fails to support his claim with factual allegations, the appellant is entitled to file an amended petition with the aid of appointed counsel.³ Tenn. Code Ann. § 40-30-107, § 40-30-115 (1990). We conclude that the appointment of counsel to aid in the drafting of an amended petition is necessary to aid both the appellant and the courts in bringing this matter to a proper conclusion. Swanson, 749 S.W.2d at 734

¹ A *pro se* petition is held to a less stringent standard than formal pleadings drafted by lawyers. Swanson v. State, 749 S.W.2d 731, 734 (Tenn. 1984).

² Under Tenn. Code Ann. § 40-30-115(a), the trial court "may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief."

³The petition raises an appropriate ground for post-conviction relief, ineffective assistance of counsel. See generally Tenn. Code Ann. § 40-30-105(1990). When a colorable claim is presented in a *pro se* petition, dismissal without appointment of counsel to draft a competent petition is rarely proper. Swanson, 749 S.W.2d at 734.

(citation omitted).

In accordance with the provisions of the Post-Conviction Act, this case is remanded to the trial court for submission of an amended post-conviction petition by the appellant with the assistance of appointed counsel.

DAVID G. HAYES, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

WILLIAM M. BARKER, JUDGE